FIRST DIVISION
September 16, 2013

No. 1-12-1978
2013 IL App (1st) 121978-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARK FULLER and SARAH FULLER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees and Cross-Appellants,	)	Cook County
	)	
v.	)	No. 08 L 1046
	)	
LIBERTY MUTUAL FIRE INSURANCE CO.,	)	Honorable
	)	Joan E. Powell,
Defendant-Appellant and Cross-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

Held: Plaintiffs failed to prove consumer fraud claim against insurance company where defendant did not conceal material facts about insurance policy from plaintiffs.

¶ 1 In the summer of 2007, the sump pump in plaintiffs Mark and Sarah Fuller's house failed, flooding the basement and causing about $50,000 in damage. Plaintiffs held an insurance policy on the home from defendant Liberty Mutual Fire Insurance, but the policy did not include an optional endorsement that would have covered water back-up damage. Plaintiffs conceded that there was no coverage for the incident but sued defendant under section 2 of the Consumer

Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2010)). The trial court found in favor of plaintiffs at a bench trial and awarded them $9,000 in damages plus over $50,000 in attorney fees. Defendant appeals the judgment and attorney fee award, and plaintiffs cross-appeal a pretrial ruling by the trial court that capped any potential damages award. We reverse.

¶ 2 Plaintiffs bought their original home insurance policy from defendant in 2000. As part of the application, plaintiffs were given the option to purchase several different types of additional coverage in addition to the basic policy. One of these additional coverages was "water back-up coverage," which can be purchased and added to a basic policy for an additional premium. Plaintiffs specifically declined to purchase water back-up coverage. The insurance policy went into effect September 2000, and plaintiffs renewed the policy annually for the next seven years.

¶ 3 Defendant's witnesses explained at trial that defendant's standard practice when a new policy is purchased is to issue a "policy jacket" to the purchaser, which contains the terms of the policy itself and any endorsements. Defendant also issues a "declaration," which identifies and summarizes any endorsements or limitations that are incorporated into the policy. Whenever a policy is modified in some fashion, defendant gives policy holders notice of the changes in writing via declarations. Defendant does not, however, send a new policy jacket unless a policy holder specifically requests it. For example, in this case when plaintiffs renewed their policy each year, defendant sent plaintiffs a declaration that was labeled "RENEWAL" and identified the property, policy number, and summarized the endorsements that were part of the renewed policy. Defendant did not send copies of the complete policy, but merely identified any new or changed terms in the declaration.

¶ 4 In 2004, plaintiffs decided to tear down their existing home and build a new one on the same site, so Mark Fuller called defendant and inquired about coverage during construction. The parties stipulated that defendant eventually responded with a fax on July 9, 2004, that informed plaintiffs that defendant would continue using the existing policy while the new home was under construction. Mark Fuller recalled receiving declaration pages to this effect during the summer of 2004.

¶ 5 About a year later, in May or June 2005, Sarah Fuller called defendant to ask about increasing the limits on the policy in order to secure a mortgage on the newly built structure. According to Sarah, she spoke with Wayne Rempala, who was one of defendant's sales representatives. She told Rempala about the new structure and informed him that it had a basement. She asked for "full coverage" of the home based on her description of it. She was not asked to fill out a new application and was not sent a new policy. (Rempala disputes this version of events, and he testified at trial that he never interacted with either Sarah or Mark Fuller. He also testified that, had a customer ever asked him for "full coverage," he would have had an extensive discussion with them in order to determine what they meant by the request and explained what their options were.) Sarah apparently never received a specific response to her request, and the only documented interactions between the parties after the summer of 2005 were renewal declarations for the policy that defendant sent to plaintiff in 2005 and 2006, neither of which mentioned water back-up coverage.

¶ 6 In August 2007, a large storm caused the sump pump in plaintiffs' new home to back up, which in turn caused the basement to flood and resulted in about $50,000 in damage. After plaintiffs discovered that their insurance policy did not cover damage caused by this sort of problem, they sued defendant under a variety of theories. Extensive pretrial proceedings

narrowed plaintiffs' claims down to a single count of consumer fraud under section 2 of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2010)).

¶ 7 Prior to trial, defendant moved to limit any damages award to only $9,000. Defendant pointed out that its water back-up coverage had a cap of $10,000, minus a $1,000 deductable. Thus, even had plaintiffs purchased the additional coverage, defendant would only have been obligated to pay out $9,000 on any claim. Plaintiffs objected, but the trial court agreed with defendant and granted the motion.

¶ 8 The trial court found in favor of plaintiffs at trial on the consumer fraud claim. After resolving some issues raised in a posttrial motion filed by defendants, the trial court awarded plaintiffs $9,000 in compensatory damages and about $53,000 in attorney fees. Defendant appeals the judgment and attorney fee award, and plaintiff cross-appeals the trial court's ruling capping compensatory damages at $9,000.

¶ 9 We review a trial court's judgment following a bench trial only to determine whether it is against the manifest weight of the evidence. See *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence "only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Id.*

¶ 10 In order to prevail on a section 2 consumer-fraud claim, a plaintiff must prove "(1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade and commerce." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 501 (1996). Additionally, a plaintiff must prove that the fraud proximately caused the plaintiff's injury. See *id.* An omission is a deceptive

act. See *People ex rel. Madigan v. United Construction of America, Inc.*, 2012 IL App (1st) 120308, ¶ 9 (discussing different types of deceptive acts under section 2).

¶ 11 Plaintiffs contended that defendant violated section 2 by failing to inform plaintiffs that the policy used to cover the new house did not include water back-up coverage. Under plaintiffs' theory, when Sarah Fuller talked to Wayne Rempala in the summer of 2005 and requested "full coverage" for the new house, defendant deceptively responded with only an unclear declaration that did not explain to plaintiffs that water back-up coverage was not included under their policy.

¶ 12 As we mentioned above, one of the central disputed factual issues in this case was whether Sarah Fuller had ever actually requested "full coverage" from defendant. Sarah testified that she spoke with Rempala, but Rempala denied that such a conversation ever occurred. He also noted that defendant requires its employees to maintain records of any contact with policy holders, and according to Rempala there was no record of Sarah Fuller ever talking to him. The trial court, however, is "in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza*, 384 Ill. App. 3d at 859. When witnesses give contradictory testimony in a bench trial, we "will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Id.* In this situation, we cannot say that it was unreasonable for the trial court to believe Sarah over Rempala regarding the 2005 conversation, so we must leave undisturbed the trial court's factual finding that Sarah spoke with Rempala and requested full coverage for the new home in 2005.

¶ 13 But even assuming that she did, there is a crucial factor that the trial court overlooked in this case. The record is quite clear that plaintiff's residence was covered under the same policy from 2000, when they initially filled out the application and declined to purchase additional

water back-up coverage, to 2007 when the incident occurred. The central contention underlying plaintiffs' consumer fraud claim is that they were unaware that their policy did not include water back up coverage (that is, that it was not "full" coverage) and that defendant allowed them to believe that the policy covered all potential damage to the newly constructed home. The problem for this theory is that, in Illinois, the general rule is that "the insured bears the burden of knowing the contents of insurance policies and has an affirmative duty to bring any discrepancies in the policy to the attention of the insurer. Furthermore, the law does not impose a duty on the insurer to review the adequacy of an insured's coverage, and when the premiums become due, the insured has the option of accepting, rejecting, or requesting a modification of the terms of the policy." *Furtak v. Moffett*, 284 Ill. App. 3d 255, 257 (1996).[1]

¶ 14 This case is strikingly similar to *Golf v. Henderson*, 376 Ill. App. 3d 271 (2007), in which we considered the effect of this rule on a section 2 consumer-fraud claim. In that case, the plaintiff brought a section 2 consumer-fraud claim against his insurance company and the agent who sold him the policy. We determined that the rule that an insured is required to know the contents of an insurance policy is not an absolute bar to a consumer-fraud claim. Referring to *Black v. Illinois Fair Plan Association*, 87 Ill. App. 3d 1106 (1980), we noted that it is important to distinguish between claims by an insured against the insurer and claims by an insured against an agent. We summarized the distinction as follows:

> "In the former cases *** the focus is on the ability of the parties to enforce the policy as written and the insured is attempting to deny the effectiveness of the

[1] An insurer does, however, have a duty to inform an insured about any changes in a renewal policy that has been modified. This duty is now codified in the Illinois Insurance Code (215 ILCS 5/143.17a (West 2008)). See *Perry v. Economy Fire & Causalty Co.*, 311 Ill. App. 3d 69, 70 (1999). This is why defendant issues written declarations to its insured when policies are renewed or changed. But plaintiffs are not claiming that defendant changed the policy without notice. Rather, the problem in this case is that plaintiffs claimed that they were unaware of the terms of the original policy.

> policy's language. In those cases, the insured has a duty to read the policy and bring discrepancies to the insurer's attention upon receipt of the policy in order to prevent the insurer's rights from being prejudiced. However, a suit between an insured and an agent does not focus on the modification of the terms of a contract or prejudice to the parties. Instead, it involves proof that the agent negligently performed his duty to the insured or that he breached his contract with the insured." *Id.* at 277.

Applying these principles to the consumer fraud claim in *Golf*, we determined that the rule did not bar the plaintiff's claim because his claim was based on misrepresentations by the agent about the original policy. We noted that "plaintiff is not denying the effectiveness of the language of the policy itself. Instead, he alleges that the insurer, through its agent, failed to fulfill their obligations pursuant to section 2 of the Consumer Fraud Act when they misrepresented the content of the policy *in selling it to* plaintiff." (Emphasis added.) *Id.* at 278.

¶ 15 But there is a crucial distinction between this case and *Golf*: plaintiffs have offered no evidence that defendant deceived them about the policy when it was sold or renewed. Indeed, the evidence here demonstrated that plaintiffs specifically declined water back-up coverage when they applied for their original policy, and that same policy remained in effect from 2000 until the incident. The record is equally clear that plaintiffs were informed via written declaration of all changes to the policy, including renewals. Unlike *Golf*, plaintiffs never presented any evidence at trial that defendant misrepresented the contents of the policy to plaintiffs either when it was first sold or when it was renewed. Even taking into account Sarah's request for "full coverage", defendants nonetheless did not have an obligation to ensure that the policy adequately covered plaintiffs' home (see *Furtak*, 284 Ill. App. 3d at 257), and defendants neither misrepresented,

concealed, nor omitted the contents of the policy in any of its communications with plaintiff. Instead, plaintiffs failed in their own obligation of knowing the contents of the policy and bringing any discrepancies to defendant's attention.

¶ 16 In light of plaintiffs' own legal duty to know the contents of their policy and the lack of evidence that defendant either misrepresented the policy when it was sold or failed to inform plaintiffs of changes to the policy, defendant cannot be liable for consumer fraud under section 2. The trial court's findings to the contrary were therefore against the manifest weight of the evidence and its judgment in favor of plaintiffs was erroneous. Accordingly, we need not address either defendant's additional contentions regarding the attorney fee award or plaintiffs' cross-appeal on the damages limitation, because they are moot.

¶ 17 Reversed.